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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Summary of Argument	9
Argument	11
I. The Operations of the Rail Industry Are Closely Interrelated with Those of Many Other Industries	11
II. The Plain Wording of the F.E.L.A. Requires an Employment Relationship	12
III. Construction of the Act by This Court Requires an Employment Relationship	13
IV. The Legislative History Confines the Act to Railroad Employees and Excludes Employees of Peripheral Industries	14
V. The Decision in Smith v. Norfolk & Western Ry. Is Erroneous	19
VI. The District Court Found An Agency Relationship and Rejected Finding an Employment Relationship	26
VII. Petitioner's Case Authority Does Not Stand for an Enlarged Plaintiff Class	31

Page

VIII. No Other Factors Present in This Case Are Sufficient to Establish an Employment Relationship 32

A. Tariff Responsibility Does Not Establish Employment 32

B. Non-delegable Duty and Operational Activity Concepts Do Not Create Employment 32

C. Free Transportation Does Not Establish Employment 36

D. It Is Not Necessary to Enlarge the Plaintiff Class in Order to Regulate the Contracting Out of Work 36

E. Unsupported Factual Contentions on Direction and Control Cannot Substitute for a Finding of Employment 37

F. The Concept of Unseaworthiness Should Not by Analogy Expand the Statutory Scope of the F.E.L.A. Plaintiff Class 38

IX. Policy Considerations Urge the F.E.L.A. Plaintiff Class Not Be Expanded 38

Conclusion 41

TABLE OF AUTHORITIES CITED

CASES Pages

Alton Railroad v. Railroad Retirement Board, 16 F. Supp. 955 ..... note 2, p.16

Baker v. Texas & P. Ry., 359 U.S. 227 ..... 9, 10, 14, 25
Brooks v. Southwestern Transportation, 494 F.2d 1271 22
Byrne v. Pennsylvania R., 262 F.2d 906 31

Chicago, R.I. & P.R. v. Bond, 240 U.S. 449 13
Cimorelli v. New York Cent. R., 148 F.2d 575 ..... 21, 31

Dougall v. Spokane, P. & S. Ry., 207 F.2d 843 34

Edwards v. Pacific Fruit Express, 390 U.S. 538 ..... 12, 25
Employers Liability Cases, 207 U.S. 463 18

Fawcett v. Missouri P.R., 242 F. Supp. 675, 347 F.2d 233 22

Hull v. Philadelphia & R.R., 252 U.S. 475 13

Kelley v. Southern P., 486 F.2d 1084 ..... 14, 25, 27, 28

Linstead v. Chesapeake & O. R., 276 U.S. 28 13

Missouri-K.-T.R. v. Hearson, 422 F.2d 1037 31

Norman v. Spokane P. & S. Ry., 101 F. Supp. 350, 192 F.2d 1020 33

Order of Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 37

Pelliccioni v. Schuyler Packing, ... A.2d ..... note 3, p. 23
Pennsylvania R. v. Barlion, 172 F.2d 710 ..... 21, 31
Pennsylvania R. v. Roth, 163 F.2d 161 ..... 21, 31

Pages

Railroad Retirement Bd. v. Alton R., 295 U.S. 330 ..... note 2, p. 16
Reed v. Pennsylvania R., 351 U.S. 502 35
Republic Carloading and Distributing v. Missouri P. R., 302 F.2d 381 ..... 32, 35
Robinson v. Baltimore & O.R., 237 U.S. 84 ..... 10, 13, 16

Schroeder v. Pennsylvania R., 397 F.2d 452 note 6, p. 24, 31
Secretary of Agriculture v. United States, 347 U.S. 645 35
Shenker v. Baltimore & O.R., 374 U.S. 1 ..... 25, 38
Sinkler v. Missouri P. R., 356 U.S. 326 ..... 25, 33
Smith v. Norfolk & W. Ry., 407 F.2d 501 ..... 9, 10, 19-26, 31
Solway Metal Sales v. Baltimore & O.R., 344 F.2d 568 ..... note 7, p. 27
Standard Oil v. Anderson, 212 U.S. 215 38

Turpin v. Chicago B. & Q.R., 403 S.W. 2d 233 22

United States v. Erie R., 236 U.S. 259 36
United States v. Interstate Commerce Comm'n., 352 U.S. 158 32

Ward v. Atlantic C.L.R., 362 U.S. 396 14
Waters v. Chicago & E.I.R., 229 N.E. 2d 151 ..... note 6, p. 24
Wells Fargo & Co. v. Taylor, 254 U.S. 175 16
Wilkerson v. McCarthy, 336 U.S. 53 39

STATUTES

California Public Utilities Code, §§ 527, 528 36
Carriers Taxing Act, 49 Stat. 974 ..... note 2, p. 16
Employers' Liability Act, 1906, 32 Stat. 232 18
Federal Employers' Liability Act (1908), 45 U.S.C. § 51 ..... 12, 16, 19, 38

Pages

Interstate Commerce Act, 49 U.S.C. § 1 ..... 32, 36
Internal Revenue Code, 26 U.S.C. § 3231 15
Jones Act, 46 U.S.C. § 688 38
Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C. § 901 40
Railway Labor Act, 45 U.S.C. § 151 ..... 14, 15
Railroad Retirement Act of 1937, 45 U.S.C. § 228 14
Railroad Retirement Act of 1934, 48 Stat. 1283 note 2, p. 16
Railroad Retirement Act (1935), 49 Stat. 967 ..... note 2, p. 16
Railroad Retirement Tax Act, 26 U.S.C. § 3231 15
Railroad Unemployment Insurance Act, 45 U.S.C. § 351 15

TEXTS AND MISCELLANEOUS

Amending the Employers' Liability Act, Senate Report No. 661, 76th Cong., 1st Sess. 18
Congressional Record (1908) 19
Cornell Law Quarterly (1951) 40
Hearings on S. 1708, 76th Cong., 1st Sess. 16
House of Representatives—Bill 8771, 93rd Cong. 1st Sess. 40
Injured or Killed Person As Employee of Carrier, American Law Reports 2d 12
Railroad Industry Work Injuries, 1938-40 40
Report of the National Commission on State Workmen's Compensation Laws 39, 40, 41
Restatement of the Law of Agency 2d 25
Senate bill 1708, 76th Cong., 1st Sess. 16

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 486 F.2d 1084 (9th Cir., 1973), Appendix p. 32.

The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing in banc is printed in the Appendix at p. 39.

The Findings of Fact and Conclusions of Law of the district court are printed at Appendix p. 28 and the Judgment at p. 31. The Findings were not published in Federal Supplement or elsewhere.

JURISDICTION

The Judgment of the Court of Appeals was entered September 7, 1973. A timely petition for rehearing with suggestion for rehearing in banc was denied and rejected November 21, 1973, no judge having requested a vote on the suggestion for rehearing in banc. (App. 39)

Petition for certiorari was docketed February 16, 1974, and granted April 15, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Shall the scope of the plaintiff-class of the F.E.L.A. be enlarged to include the employees of *agents* of common carrier railroads.

STATUTE INVOLVED

The text set forth in the brief of petitioner is not complete as material here. The pertinent provision of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 (hereafter "F.E.L.A." or "the Act") is as follows (emphasis ours):

> "51. Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

STATEMENT

This is a suit for personal injuries, purportedly brought under the F.E.L.A. The accident on which it is based occurred on July 3, 1963. The complaint was filed June 30, 1966. It alleges: a) that plaintiff was employed by defendant, or, alternatively, b) that plaintiff's true employer, Pacific Motor Trucking Co., was the alter ego of defendant. (Clerk's Record in district court, p. 1)

At pre-trial the case was bifurcated, with trial of the employment and alter-ego issues to proceed before a judge sitting without jury, and trial of the remaining issues (negligence, damages, etc.) to be held later if necessary. (App. 23,[1] Clerk's Record in district court, p. 263)

Following pre-trial, defendant moved for summary judgment. (App. 11) Plaintiff could not substantiate the alter-ego allegations, and they were abandoned. (App. 25 and 26) The motion was denied as to the employment question. (App. 24)

Trial of the employment issue commenced before The Hon. Alfonso J. Zirpoli on April 6, 1970. Following six days of testimony and argument, and submission of the cause, the court announced the intention to rule for plaintiff. (App. 149, 152) Thereafter, plaintiff submitted Proposed Findings of Fact and Conclusions of Law. (App. 161) A hearing was held in chambers at which time the court settled the Findings.

The facts found by the district court (App. 28) are adequate for these proceedings. Some of the basic terminology is as follows: "piggyback" refers to carrying truck trailers or vans on specially equipped railroad flatcars. "Multilevel" refers to the carriage of automobiles on specially constructed railroad cars having either two or three levels or decks (bi-level or tri-level cars) equipped with chains and ratchet devices to "tie down" the automobiles. "Ramping services" refers to the loading or unloading of vans or automobiles on the rail cars. In the case of piggyback, it is

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1. Please see note on the Appendix at the end of this brief.

done with a "tractor," i.e., a truck, equipped with a hydraulically raised and lowered "fifth wheel," i.e., the part which connects the tractor to the trailer. (App. 54, 96, 138) In the case of multilevel, the automobiles are physically driven off the various decks of the rail car to ramps, thence to the ground. (App. 76) Before this can be done, a number of steps are necessary (App. 76) including loosening and unhooking the tie-down chains. It was during this procedure the plaintiff was injured. The district court found: (App. 28)

> I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

Since neither party is contesting the sufficiency of the evidence, further elaborate discussion of the findings is not needed. We would, however, like to emphasize the following points which underlie certain of the Findings.

In regard to plaintiff's employment with Pacific Motor Trucking Co., hereafter referred to as PMT, the plaintiff testified that he knew a company such as PMT existed (App. 138), that his father worked for it since 1938 (App. 138), that he made an application for employment to PMT (App. 137), that he worked for it eight years (App. 131), that he was a member of Teamster Local 85 (App. 139), and that he had never belonged to a railroad craft union (App. 139). Both Kelley (App. 136-137) and his co-employees testified they took orders through the PMT chain of command:

> The Court: Who did you consider the boss?
>
> The Witness: Well, I considered my P.M.T. supervisor the boss.
>
> The Court: Mr. Pinkston and Mr. Hauff?
>
> The Witness: Right.
>
> The Court: How about Mr. Hellwig, did you consider him being superior to them?
>
> The Witness: Sure did.
>
> The Court: All right. Well now, of all these people that you name, who would you consider the basic, your basic authority, the man you would obey?
>
> [Objection by counsel for plaintiff, sustained. App. 71-72. Pinkston, Hauff and Hellwig had all been identified as PMT supervisors. For other similar testimony, see App. 57, 85, 140-141 plus seven omitted lines (printed in note at end of this brief).]

In response to the foregoing, the district court made Finding II: (App. 28)

> II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

In regard to Findings IV and V (App. 29), which concern PMT's performance as agent for Southern Pacific in the unloading of autos, the full scope of the evidence was as follows: in 1937 PMT started hauling automobiles in multiple-deck truck trailers (App. 97). PMT developed employees capable of performing the loading and unloading functions (App. 97). PMT is one of the largest auto transporters in the country (App. 97). When tri-level rail services came along in the early or mid sixties (App. 97), Southern Pacific (hereafter sometimes SP) contracted with PMT to perform ramping functions at San Francisco (App. 98); the same PMT employees who unloaded the highway auto

carriers at that terminal were used to unload the tri-levels (App. 97). The California Trucking Association is the bargaining agent for PMT and the entire California trucking industry (App. 13, 93). The C.T.A.'s collective bargaining agreement with the Teamsters contained various "piggyback" clauses governing the performance of piggyback and multilevel ramping services by teamsters (App. 92-96). The evidence indicated that although PMT performed the ramping work at San Francisco, other trucking companies performed it at different locations. (App. 120-121, 14; Reporter's Transcript in district court, typed No. p. 313, stamped No. p. 365) Eugene C. Kelley, himself, testified that since the start of his employment (eight years) he had off and on performed piggyback and multilevel ramping work (App. 131).

Further in regard to Findings IV and V and PMT's status as agent, Pacific Motor Trucking Co., although a wholly owned subsidiary of SP is, in its own right, one of the largest motor common carriers in the West: it holds certificates of public convenience and necessity (App. 14) and is regulated as a common carrier pursuant to Part II of the Interstate Commerce Act (App. 15). It operates over 15,000 route miles (App. 13) in seven western states (App. 91) with four thousand employees (App. 91). It publishes tariffs and conducts business directly with the public (App. 17) with its own personnel and equipment (App. 17). It has assets in excess of $37,000,000 and current assets of nearly $10,000,000 (App. 15). It does not have common officers, interlocking directorates or joint employees with SP (App. 12, 13, 15). It maintains general offices in San Francisco where it performs all managerial services.

In Finding VI (dealing with tools), the court held that the record was "not clear" as to who supplied the hammers and ratchet wrenches used by the PMT personnel. There

was practically uncontradicted testimony that PMT supplied all the tools on the job, namely a ratchet (App. 55, 77), a plastic hammer (App. 55), a special tractor fitted with a hydraulic fifth wheel (App. 54, 96, 138), rain gear, overalls, gloves, and protective clothing (App. 95). Perhaps the court's finding on this subject was because of a confusing answer to an interrogatory (App. 129). At any rate, there certainly was no question, and we acknowledge, that the location (i.e., the real property and tracks) where the accident occurred, and the ramps for unloading, were railroad property.

In regard to Finding VII (dealing with safety inspection), we do not question that it was the work and responsibility of SP mechanical department forces to make inspections on the rail cars and to make repairs where needed. We wish to point out, however, that it was uncontradicted that the work of raising the safety railings belonged to PMT employees: (App. 131, the court examining the plaintiff)

> The Court: Well, somebody raised the railing there?
>
> The Witness: Right.
>
> The Court: On each job. Well, who did that work?
>
> The Witness: Anybody could do it.
>
> The Court: Well, the members of your crew did it? Did you ever see the carmen do it before you started the job?
>
> The Witness: No, I can't say I did.
>
> The Court: So that when you say anyone, you mean anyone, for instance, such as the four of you that were working there on the third of July?
>
> The Witness: Right.

See also Appendix 52, 62.

Finally, on the subject of supervision, and as further basis for Finding VII that, ". . . the exercise thereof was executed by employees of Pacific Motor Trucking Company. . .," the evidence showed that the only SP employees who worked regularly in the area were the car clerk and two car inspectors (App. 78 and 79, 141). These persons were 400 feet away and one block away at the time of the accident (App. 86, 142). One of them did not come to the scene (App. 142), and the others came only when they saw the ambulance (App. 87). In other words, the evidence disproved any active direction and control by SP personnel. There simply were none of them around (App. 78, 79).

After the accident Kelley retained a prominent firm of plaintiff's personal injury attorneys. Workmen's compensation benefits were already being supplied by PMT (App. 10). The attorneys obtained an award from the California Workmen's Compensation Appeals Board (App. 9). The common law action against this defendant apparently was overlooked. The period of limitations for such an action was one year and ran without suit being filed. Three days before the expiration of the F.E.L.A. three-year period (45 U.S.C. § 56), this action was instituted.

At trial of the employment issue, the district court found for plaintiff on the twin bases that the work of unloading was a non-delegable activity of the railroad, and that the plaintiff was the employee of an agent of the raiload.

Thereafter the parties at a later hearing stipulated in open court as to remaining issues (including damages) and judgment was granted and entered. (App. 31)

The Court of Appeals, squarely confronting a conflict with the Fourth Circuit, held that the relationship of agency to a railroad was not sufficient to place one within the plaintiff class of the F.E.L.A., and reversed. (App. 32)

SUMMARY OF ARGUMENT

The plaintiff was an employee of a trucking company, injured while unloading new automobiles from a railroad tri-level car situated on railroad property. Plaintiff sued defendant under the F.E.L.A. alleging i) that he was the employee of defendant, and ii) that his true employer, the trucking company, was the alter ego of defendant. The alter-ego theory was abandoned. The district court held for plaintiff on the ground plaintiff was an *employee of an agent* of defendant, citing *Smith v. Norfolk & Western R.*, 407 F.2d 501 (4th Cir., 1969), cert. den. 395 U.S. 969. The Ninth Circuit reversed (486 F.2d 1084 (9th Cir., 1973)) on the ground the F.E.L.A. is applicable only where a common law master-servant relationship exists, citing *Baker v. Texas & P. R.*, 359 U.S. 227 (1959).

The F.E.L.A. establishes three classes: the plaintiff class, consisting of employees and personal representatives; the defendant class, consisting of common carrier railroads; and a class of persons for whose acts the carriers are made liable, consisting of officers, agents and employees.

By a plain reading of the statute, non-servant agents are not included in the plaintiff class. Also, since "agents" are mentioned in another class, they are excluded from the plaintiff class by operation of *expressio unis est exclusio alterius.*

In the 1939 amendments to the F.E.L.A. Congress declined to extend the Act to several peripheral industries. This, however, is exactly petitioner's situation—he is an employee of a peripheral industry. In addition rail industry social insurance and labor relations legislation passed in the decade of the 1930's excludes carrier affiliated trucking service, thus exhibiting the same pattern of separate legislative treatment for this particular peripheral industry.

This Court has a settled line of judicial construction in which the plaintiff class is confined to employees, starting with *Robinson v. Baltimore & O. R.*, 237 U.S. 84 (1915), and extending through *Baker v. Texas & P. R.*, 359 U.S. 227 (1959).

Nor do cases from other courts support the *Smith* formulation. Instead they recognize that one becomes a member of the plaintiff class by three means: i) by being a true employee—not present here, ii) by being a borrowed servant—rejected by the district court here, iii) by being an employee of an alter ego of a railroad—specifically abandoned by plaintiff here.

The *Smith* case is erroneous in that it:

i) takes alter ego language from other cases ("employee of an agent or adjunct") and transforms it into an agency concept,

ii) talks about agency when the authorities to which it refers are dealing with employment,

iii) cites cases which do not even discuss, let alone support, its central premise that employees of agents belong in the plaintiff class, and

iv) ignores the plain wording of the Act and settled judicial construction of this Court.

The district court, while specifically finding plaintiff an employee of the trucking company, rejected a proposed Conclusion of Law stating plaintiff was an employee of defendant, and did not find defendant to be in any relationship other than that the trucking company was its agent.

The concepts of non-delegable work and "operational activity" operate only to make sure the carrier does not escape liability to those in the plaintiff class, and do not operate to create employment where none exists. Likewise, there is no need to construe this work-injury statute for purposes of preventing the contracting out of work. Collective bargaining laws and arrangements are the proper devices to control that.

Rail tariffs are required to cover all accessorial services in connection with the transportation of property by railroad. This does not mean these services are necessarily performed by railroad employees. To so construe the Act would result in extending it to significant new groups of workers.

Expansion of the F.E.L.A. to new groups runs counter to the accepted norm for the adjustment of work-connected injury. It would result in extending and perpetuating a cruel, outmoded and wasteful system. It would inevitably hinder the operation of concurrent workmen's compensation.

ARGUMENT

I. The Operations of the Rail Industry Are Closely Interrelated With Those of Many Other Industries.

The basic framework of this case has to do with the scope of the plaintiff class of the F.E.L.A. As will be argued in a moment, the Act confines the plaintiff class to employees of common carrier railroads. The plaintiff here, however, was an employee of a trucking company. He was injured while working on a railroad car, situated on railroad property.

The operations of the rail industry are closely interrelated with those of many other industries—shippers, consignees, suppliers, other railroads, those performing services on its premises, those working on or about railroad cars—and a host of terminal and accessorial functions —icing, weighing, storage, loading and unloading, receipt, delivery, elevation, transfer in transit, refrigeration, etc.

This Court has noted, ". . . there exist a number of activities and facilities which, while used in conjunction with

railroads and closely related to railroading, are yet not railroading itself." *Edwards v. Pacific Express Co.*, 390 U.S. 538 at 540 (1968).

An often litigated question is whether the employees of such firms, when injured, are eligible for a Federal Employers' Liability Act suit against the common carrier railroad. In fact there are literally hundreds of appellate decisions on the question. See the comprehensive annotation in 30 A.L.R.2d 517 (1953). This case presents that familiar problem in a relatively new technological setting, that of piggyback and multilevel rail service. The factual situation, however, is not the distinguishing feature of this case. Rather, the distinctive aspect, as will be hereafter argued, is a new legal setting—a formulation by the Fourth Circuit in which "agents" and their employees are within the F.E.L.A. plaintiff class. The correctness of that formulation is the basic question posed by this case.

II. The Plain Wording of the F.E.L.A. Requires an Employment Relationship.

The operative part of section 51 has been set forth previously in the section entitled STATUTE INVOLVED. The Act sets up three classes: a plaintiff class consisting of employees and personal representatives of deceased employees; a defendant class consisting of common carrier railroads and trustees thereof; and a class of persons for whose acts the carriers are made liable—officers, agents or employees. As to the plaintiff class the key words are, ". . . while he is employed" by such carrier. The plain wording obviously does not include non-servant agents or the employees of such agents. Moreover, the third class—persons for whose acts the carriers are liable—*does* specifically include agents. Under regular principles of statutory construction, the use of the word in the one class operates to exclude it from the classes where it is not mentioned—*expressio unis est exclusio alterius*. Thus both from a plain reading and from application of standard principles, the plaintiff class is not broad enough to include agents or their employees.

III. Construction of the Act by This Court Requires an Employment Relationship.

In construing the plaintiff class of the F.E.L.A., this Court has consistently held that the Act requires an employment relationship. The basic case is *Robinson v. Baltimore and Ohio R. Co.*, 237 U.S. 84 (1915). There the plaintiff was a Pullman Company porter. Discussing the applicability of the F.E.L.A., the Court states:

> ". . . The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employees' of the carrier, and not to others; . . ." (p. 91)
>
> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." (p. 94)

Other fundamental cases are *Chicago, R. I. & P. R. v. Bond*, 240 U.S. 449 (1916), *Hull v. Philadelphia & R. R.*, 252 U.S. 475 (1920), and *Linstead v. Chesapeake & O. R.*, 276 U.S. 28 (1928).

In more recent years the Court has held in two *per curiam* opinions that "borrowed servant" is part of the concept of employment. *Baker v. Texas and Pacific R.*, 359 U.S. 227 (1958); *Ward v. Atlantic Coast Line R.*, 362 U.S. 396 (1960). In doing so, however, the Court reiterated the basic rule:

> "The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act . . ."
>
> *Baker v. Texas & P. R. Co.*, 359 U.S. 227 at 228 (1958).

There is no authority from this Court that being an agent or an employee of an agent is sufficient to place one within the F.E.L.A. plaintiff class.

IV. The Legislative History Confines the Act to Railroad Employees and Excludes Employees of Peripheral Industries.

In the last paragraph of its opinion, the Court of Appeals observes that the legislative history of the 1939 amendments to the F.E.L.A. precludes treating employees of contractors as if they were employees of the railroad when common law analysis fails to yield that conclusion. The heart of the matter is set forth by the Court of Appeals. The detail of it is as follows.

In the decade of the 1930's, Congress enacted the basic labor relations and social insurance legislation for the rail industry. See the amendments to the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. § 151; the Railroad Retirement Act

of 1937, 50 Stat. 307, 45 U.S.C. § 228a; the Railroad Retirement Tax Act, 50 Stat. 435 (1937), Internal Revenue Code of 1954, 26 U.S.C. § 3231 (a); the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C. § 351 (a).

In each of these acts, Congress included railroad-owned or controlled companies which performed services in connection with the transportation. That is, Congress included rail-owned companies performing accessorial services. But Congress specifically *excluded* from such coverage railroad-owned companies performing "trucking service." See the "(other than trucking service)" exclusion in the sections of the various acts cited above. Congress thus accorded a separate legislative treatment not only to the carrier affiliated peripheral industries (by inclusion) but especially to railroad-owned trucking companies furnishing services in connection with railroad operations (by exclusion).

The reason for this exclusion is simple. The first of the bills to be enacted was the 1934 amendments to the Railway Labor Act. Commissioner Joseph B. Eastman, Federal Coordinator of Transportation, was the draftsman of the 1934 amendments. Their history indicates that Mr. Eastman first intended to include within "carrier" those rail trucking subsidiaries performing terminal delivery services. Because the proposed inclusion of trucking companies in the coverage of the Railway Labor Act was not desired, the bill was thereafter amended by the House Committee by insertion of the specific "(other than trucking service)" exclusion. As thus amended, the Senate committee concurred. The bill was, in that form, enacted by both Houses and signed into law by the President. The legislative histories of the Railroad Retirement Act and the Railroad Unemployment Insurance Act exhibit this same pattern of

exclusion of trucking service.[2] This is the background against which Congress considered the proposed amendments to the F.E.L.A. in 1939—i.e., a decade of recognition and separate legislative treatment of teamster performed terminal services.

In 1939 Congress substantially amended the F.E.L.A., 53 Stat. 1404. One of the proposed amendments was Senate Bill 1708 (76th Cong. 1st Sess., 1939). This bill would have amended Section 1 of the Act to read:

> "Every common carrier by railroad, including every express company, freight-forwarding company, and sleeping-car company, engaged in commerce . . ."

Such a proposal was, of course, in the face of this Court's construction of the Act to exclude employees of sleeping-car companies and express companies (*Robinson v. Baltimore & Ohio R.*, 237 U.S. 84 (1915); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920).

The same objections were raised to the inclusion of teamster services within the ambit of the F.E.L.A. as had been raised to their inclusion in the railroad labor relations and social insurance legislation! Hearings were held before a sub-committee of the Committee on the Judiciary of the Senate commencing Tuesday, March 28, 1939.

2. The Railroad Retirement Act of 1934 48 Stat. 1283, carried over the definition of "carrier" from the 1934 amendments to the Railway Labor Act. The Retirement Act was held unconstitutional, *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). Congress then separated the retirement and taxing provisions in an effort to overcome the constitutional objection. Railroad Retirement Act (1935), 49 Stat. 967; Carriers Taxing Act, 49 Stat. 974 (1935). The taxing act was also held unconstitutional, *Alton Railroad v. Railroad Retirement Board*, 16 F. Supp. 955 (D.C. Dist. 1936). Thereafter the present laws, previously cited, were enacted.

The General Counsel of the Brotherhood of Railroad Trainmen testified. In regard to S. 1708 he was asked:

> "Senator Burke. You see no objection to it, do you?

The General Counsel (Mr. McGrath) then explained to the senators his reservations:

> "Mr. McGrath. I do not, but I have some doubt—and this is my personal opinion—about the wisdom of putting in freight-forwarding companies without some further consideration, because there are many freight-forwarding companies. In some instances there are trucking companies that call themselves freight-forwarding companies, and there are companies which are subsidiaries of railroads that carry on their business in part by truck and in part by rail . . ."

Later, when the representative of Railway Express testified, the following exchange occurred:

> Mr. Wilson. I am authorized to speak only for the company, but yesterday a representative of one of the unions told me I might speak for him. • • •
>
> Mr. Wilson. Both Mr. Harrison and *Mr. O'Brien, the latter representing the International Brotherhood of Teamsters,* Chauffeurs and Helpers. Mr. O'Brien stated very definitely that he was very much opposed to the inclusion of express companies . . .
>
> Senator Neely. At whose request were the express companies and the Pullman Co. included in the proposed legislation?
>
> Mr. McGrath. Maybe I can throw a little light on that question.
>
> • • •
>
> *The representative of the teamsters was here yesterday.* He referred to his affiliation with the American Federation of Labor, and said that he might be opposed to certain features of the bill. In discussion with him later he indicated that they *did not want to have*

the teamsters brought under the act. That is as much information as I can give you on the subject." (Emphasis added) (Hearings on S. 1708—Before the Subcommittee of the Committee on the Judiciary, 76th Cong., 1st Sess., pp. 3, 26, 56, 57 (1939))

The report in the Senate on the bill which ultimately passed states:

> The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute. (Senate Committee on the Judiciary, Amending the Employers' Liability Act, S.Rep. No. 661, 76th Cong., 1st Sess.)

The significance of all this is plain. In the decade of the 1930's, Congress not only amended the F.E.L.A. but also enacted major legislation for the railroad industry in the fields of labor relations and social insurance. By that time, trucking company accessorial services for railroads were a long established practice. The legislative history (as well as the plain wording) of these acts unequivocally shows Congressional awareness of this service and intent to exclude it. When it came time to amend the F.E.L.A., Congress likewise declined to extend the Act to new fields of activity —including new fields serviced by the trucking industry.

Furthermore, in considering the legislative history of the F.E.L.A., it is worth noting that the Employers' Liability Act of 1906, 32 Stat. 232, (held unconstitutional in the Employers' Liability Cases, 207 U.S. 463 (1908)) applied to every common carrier—not just railroads. (See p.

497 of the opinion for discussion.) This feature was changed in the 1908 version of the Act. In debate on the floor of the Senate on passage of the 1908 act, one sponsor of the bill explains:

> "The House bill [which was the bill finally enacted] confines its application entirely to the employees of railways engaged in interstate commerce, whereas the act of 1906 was applicable not only to railways, but to all common carriers . . ." Cong. Rec. 4527 (1908) (remarks of Senator Dolliver)

Also, at a later point, another sponsor of the legislation states:

> "I desire that this enactment shall apply to the great army of men who are engaged in operating trains in interstate commerce . . .
>
> At present, Mr. President, I desire to cooperate with my fellow-Senators here in the passage of a bill which relates to railroad employees alone, and I hope that the bill as it came from the House will pass the Senate without being complicated by needless extension to other and less pressing subjects." Cong. Rec. 4539 (1908) (remarks of Senator Carter)

Thus the contrasts between the 1906 and 1908 acts indicate Congress did not intend the new act to extend to the employees of other common carriers, or, indeed to the employees of anyone except the railroads. The purpose of the legislation was to protect the "great army of men who are engaged in operating trains"—not those in affiliated industries whose needs were deemed "less pressing subjects."

V. The Decision in Smith v. Norfolk & Western R. Is Erroneous.

The basis for the district court's ruling in favor of plaintiff is a 1969 decision of the United States Court of Appeals for the Fourth Circuit, *Smith v. Norfolk and Western R.*,

407 F.2d 501 (4th Cir. 1969), cert. den., 395 U.S. 979, a case which is genuinely conflicting with the decision of the Ninth Circuit in this case. The factual setting of *Smith* is exactly parallel to the present case, .i.e., a teamster employee of a trucking company fell from the top level of a tri-level rail car while unchaining automobiles preparatory to unloading them. The trucking company was acting as the agent of the railroad. The court in *Smith* explicitly states that, "In our case the plaintiff was *not* an employee of the railroad . . ." (p. 502, emphasis is the court's).

After reciting the facts, the *Smith* court in the second paragraph articulates the legal premise underlying the entire opinion:

> ". . . if the injured worker is employed by an *agent* . . . of the railroad he will be treated as an employee . . . for the purposes of the Act. [citations omitted] Thus traditional concepts of agency extend the coverage of the Act." (p. 502, emphasis supplied)

The remaining four paragraphs of the opinion are devoted—not to explaining the underlying legal premise—but to reinforcing the district court's finding of *agency*. The decision is erroneous in at least the following respects:

1. It confuses the concepts of employment, independent contractor and agency. For example, the court continually refers to Restatement of Agency 2d § 220 as setting forth the standards for determining *agency*, whereas the true subject of the section is employment.

2. It overlooks the plain language of the statute which confines the plaintiff class to employees. It also overlooks the operation of the principle *expressio unis*, in that "agents" are expressly mentioned in another class.

3. The authorities cited by the *Smith* court do not stand for the proposition for which they are cited—e.g., that an employee of an agent is within the plaintiff class. The *Smith* decision relies on three cases from the Sixth Circuit: *Cimorelli v. New York Cent. R.*, 148 F.2d 575 (6th Cir., 1945); *Pennsylvania R. v. Roth*, 163 F.2d 161 (6th Cir., 1947); and, *Pennsylvania R. v. Barlion*, 172 F.2d 710 (6th Cir., 1949). In each of these cases the court adopts an orthodox analysis of the Act—i.e., it looks for and finds an *employment* relationship. (*Cimorelli*: "[plaintiff] was the employee of appellee." 148 F.2d at 577: *Roth*: "The District Judge . . . instructed the jury as a matter of law that [the plaintiff] was at the time of the accident in the employ of the appellant . . ." 163 F.2d at 163; *Barlion*: ". . . appellee Barlion was subject to the Federal Employers' Liability Act as an employee of the railroad." 172 F.2d at 712.) These cases do not hold that being an employee of a railroad's agent—as opposed to being an employee of the railroad itself—is sufficient to place one within the F.E.L.A. plaintiff class. As contrasted with these cases, the *Smith* court specifically states, ". . . the plaintiff was *not* an employee of the railroad." (p. 502, emphasis is the court's) *Cimorelli*, *Barlion* and *Roth* are, perhaps startling results for a defense oriented lawyer, but nevertheless the rationale is conventional—i.e., *the injured person is found to be an employee of the common carrier railroad.*

4. The *Smith* opinion takes the wording "agent or adjunct" and construes it so that "traditional concepts of agency extend the coverage of the Act." However, the source of that wording is *not* in the law of agency but in the law of alter ego. Cases in which truck company employees sue railroads under the F.E.L.A. illustrate this:

In *Fawcett v. Missouri Pacific R.*, 242 F. Supp. 675 (W.D. La. 1965), afd. *per curiam* 347 F.2d 233 (5th Cir. 1965), cert. den. 382 U.S. 907, the deceased was an employee of Missouri Pacific Truck Lines, a wholly-owned subsidiary of the defendant railroad. He was killed while loading trailers on a flatcar. The plaintiff advanced three possible bases for inclusion in the F.E.L.A. plaintiff class, an analysis which is equally pertinent here:

> i) The worker is hired by the railroad, on its payroll, and under its direction and control.
>
> ii) The worker is hired by someone other than the railroad, but is under its direction and supervision.
>
> iii) The worker is an employee of an "adjunct or agent" of the railroad. (The exact phraseology of the *Smith* opinion.)

The court states, "Admittedly the first two situations are not involved." As material here, however, the court then notes, "There remains the third possibility . . ." (p. 677) The court recognized this as an alter ego theory:

> "As we analyze it, plaintiff's real contention is that because the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad." (p. 677)

After a careful review of the controlling authorities, the court rejects this contention. Judgment was granted for the defendant. The Fifth Circuit affirmed (347 F.2d 233), finding itself, "in agreement with the opinion, findings and conclusions of the district court." (p. 233)

Turpin v. Chicago, B. & Q. R., 403 S.W. 2d 233 (Missouri, 1966), cert. den. 384 U.S. 1003 was cited and relied upon by the Ninth Circuit in its opinion in this case. The plaintiff was employed by Burlington Truck Lines, a wholly-owned subsidiary of the defendant railroad. He claimed injury while chaining trailers on flatcars. The court considered a number of theories by which the plaintiff could become a member of the F.E.L.A. plaintiff class, including, i) that of railroad control and supervision of plaintiff, ii) that plaintiff was "furthering operational activities" of the railroad, iii) that a subsidiary trucking corporation was an "illegal device" to avoid the F.E.L.A., and iv) that the truck company was the alter ego of the railroad. This comprehensive opinion treats in detail factual contentions remarkably similar to those raised in the present case. It discusses the leading authorities on each legal theory. As pertinent here, the plaintiff contended, "the sole ownership of stock and the presence of railroad officers on the Truck Lines board," proved that the truck company was the mere "agent" of the railroad. The Missouri Supreme Court recognized this as alter ego theory. Citing *Fawcett* and applying recognized federal authorities, it concluded there was no justification for disregarding the separate corporate identities.

In *Brooks v. Southwestern Transportation*, 494 F.2d 1271 (6th Cir. 1974) the Sixth Circuit *cited and relied upon* this case, *Kelley v. Southern Pacific*.[3]

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3. Another recent case *citing this case* and *agreeing with the Ninth Circuit* is the Appellate Division, Superior Court of New Jersey, *Pelliccioni v. Schuyler Packing*, —— A.2d —— (Super. Ct. N.J. App. Div., A 2241-72).

The decedent was an employee of a trucking company. Plaintiff's theory was alter ego: The railroad defendant owned all the trucking company stock, had some common officers, advanced money to it, received dividends, etc. The court easily recognizes the separate corporate identities, that the trucking company is not a railroad, and the railroad not the employer. (p. 1272)

The point of the foregoing cases for present purposes is, although the *language* used for these contentions is that of the law of agency, the body of law which is actually sought to be applied is that of alter ego. In the *Smith* case,[4] as here,[5] however, *there is no alter ego issue*. Therefore the *Smith* court was wrong i) to import this concept (alter ego) into the case at all, and ii) to mislabel it as an agency concept.[6]

5. The opinion fails to take note of the legislative history of the 1939 amendments to the F.E.L.A. Essentially that same history and analysis is set forth in

4. Because Baker-Driveaway Company, the trucking company, was not owned by the defendant railroad and alter ego was not discussed in the opinion.

5. Because *specifically abandoned* by plaintiff in the trial court and here: App. 26, last paragraph; footnote 1, p. 5, petition for writ of certiorari; footnote 3, p. 6, Brief of Petitioner. See opinion in Court of Appeals, App. bottom 34 and top 35.

6. The Court should not gather from *Fawcett, Turpin* and *Brooks* that only railroad-owned truck companies perform ramping services. Cases illustrating F.E.L.A. actions where non-railroad-owned truck firms were involved are: *Waters v. Chicago & E. I. R.*, 86 Ill. App. 48, 229 N.E. 2d 151 (1967) and *Schroeder v. Pennsylvania R.*, 397 F.2d 452 (7th Cir. 1968). In the nature of things, however, the alter ego theory is only likely to appear where the trucking company is owned by the railroad. Of course, this is exactly the type of entity (carrier affiliated companies) which is the subject of the statutory history set forth in section IV of the Argument.

Edwards v. Pacific Fruit Express, 390 U.S. 538 (1968), the last case in which this Court considered the scope of the F.E.L.A. The Fourth Circuit either was not aware of it or chose to ignore it. The Ninth Circuit rightly placed reliance on it.

6. Although it declines to cite it as a precedent, the *Smith* opinion — erroneously — derives support from *Sinkler v. Missouri Pacific R.*, 356 U.S. 326 (1958).

Sinkler is the case in which a cook on a business car was injured through the switching activities of a belt line railroad. The court held the switching was an operational activity for which the railroad was liable. *Sinkler*, however, is a construction, not of the plaintiff class, but of the class of "officers, agents and employees," for whom a railroad is liable. The doctrine enunciated in this case operates to protect one who was concededly an employee of the defendant railroad. The case does not construe the plaintiff class and did not create an employment relationship where none actually existed. The *Smith* court is wrong, therefore, in suggesting, "We need not decide" whether operational activity extends the plaintiff class (p. 502). *Sinkler* simply could not be authority for that proposition.

7. The *Smith* court was wrong to single out and place reliance on only one factor (regular business) from Restatement of Agency 2d § 220's list of ten factors. Especially was it wrong when: a) this Court has stated that no one factor is determinative (*Baker v. Texas & P. Ry.*, 359 U.S. 227 at 228 (1959)), and, b) it completely overlooks the factor which this Court said is "critical" — *immediate control and supervision* (*Shenker v. Baltimore & Ohio R.*, 374 U.S. 1 at 6

(1963)). Thus, even if the *Smith* court was discussing "employment" instead of "agency," it misapplied the criteria for determining employment.

8. The reasoning of the *Smith* court is superficial. The court reasons from tariff liabilities ("the railroad has undertaken a contractual duty") and freight claims liabilities ("Yesterday's cattle may be today's Chryslers") into the field of adjustment of work-connected injuries—a field where the problems to be solved and the policy considerations are vastly different.

For the foregoing reasons the *Smith* decision ought to be disapproved.

VI. The District Court Found an Agency Relationship and Rejected Finding an Employment Relationship.

On page 18 of his brief, petitioner states:

> "The District Court, as trier of fact, found that petitioner was an 'employee' of Southern Pacific Company for purposes of F.E.L.A. coverage . . ."

If that is true, why does not petitioner simply quote the Finding? It is simple enough in regard to PMT:

> "II. Plaintiff and the three men he was working with . . . were in the employment of Pacific Motor Trucking Company." (App. 28)

If petitioner's assertion is true, why not set forth verbatim the appropriate Finding? The answer is obvious: a search of the Findings and Conclusions nowhere discloses any language of employment in regard to Kelley and SP.

What the court *does* find, in three specific places, is that PMT was the *agent* for SP. (Findings IV, V and VIII, App. 29) *No other relationship is mentioned.* It is thus apparent the district court found Kelley to be an employee of PMT, and PMT to be an agent of SP, and nothing more!

As the Ninth Circuit notes:

> "Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific." (App. 34)

The district court did, indeed, have before it material allegedly showing railroad direction and control. This material was vigorously presented and argued by petitioner. Thereafter petitioner proposed the following Findings of Fact and Conclusion of Law:

> PROPOSED FINDING II: "Defendant Southern Pacific Company . . . had the right to exercise control over the details of the work . . ." (App. 162)
>
> PROPOSED FINDING IX: "Defendant Southern Pacific Company and the plaintiff Eugene C. Kelley believed that a relationship of master and servant existed . . ." (App. 163)
>
> PROPOSED CONCLUSION I: "The plaintiff, Eugene C. Kelley, was an "empoyee" of defendant . . ."[7] (App. 163)

The district court *refused to adopt* any of these proposed statements. Instead the district court adopted findings in which:

i) it placed in SP the "responsibility,"[8] but *not actual*

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7. Petitioner argues this statement was proposed as a Conclusion of Law only, and not as a Finding of Fact. The district court, however, regarded this ultimate fact as *both* a question of fact and a conclusion of law (Finding IX and Conclusion I). Moreover, had the district court adopted petitioner's proposal as a conclusion of law, it would be legally effective also as a finding of fact. See for example, *Solway Metal Sales v. Baltimore & O. R.*, 344 F.2d 568 (D.C. Cir., 1965).

8. The sense in which the district court uses the term "responsibility" in Findings IV and VII is truly enigmatic. The senses in which it is *not* used (actual control or right to control) are indicated above. In addition, the way the term is used, there seems

control (found to be in PMT: "the exercise thereof was executed by . . . Pacific Motor Trucking Company,") or the *right to control* (proposed by petitioner but rejected by the court), and

ii) the statement "Kelley, was an 'employee' " (proposed by petitioner) was changed to read, "brought plaintiff within the traditional agency relationship."

Thus in summary the district court *rejected* findings: i) in which the main factor in determining employment—control—was placed in SP, and ii) of the ultimate fact itself—SP employment.

In addition, a second aspect of petitioner's proposed findings deserves mention. It is a negative aspect: at no point does petitioner propose the use of the term "agent." That term, and the findings embodying it, were purely the product of the district court. The adoption of the findings on agency and the rejection of those on "employment" were not inadvertent.

As the Ninth Circuit noted, "[the district] court adopted a special concept of 'employment' for F.E.L.A. purposes that has found favor with the Court of Appeals for the

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to be nothing wrong with a delegation of the responsibility, e.g., in Finding IV, the court states the work was the "responsibility" of SP, "to be performed by it *or through its agents* . . ." (emphasis ours) Furthermore, the term "responsibility" is not necessarily synonomous with "right to." For example, SP has extensive telephone and computer systems. These are installed and serviced by telephone company and IBM personnel. SP obviously has the "responsibility" for seeing that these systems continue to function. Indeed, given the present state of rail technology, the "franchise" could not be operated if they did not. However, in spite of the responsibility, SP does not have on its payroll the technical personnel capable of servicing them. In any case, even if one interpreted Finding VIII as a finding of SP control, this would not amount to a finding of employment. Control would have significance only to show plaintiff was a borrowed servant or in some similar status. But it was exactly petitioner's Proposed Conclusion No. I—which cites two cases (not quoted) dealing with borrowed servant—that the district court rejected.

Fourth Circuit . . ." (App. 35). That the district court did so cannot be doubted. First, in announcing its ruling the court *said so:*

The Court: All right.

While an understanding of the full scope of the language of the statute, and, in particular, the terms "while he is employed by such carrier" present serious difficulty, . . .

This language when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles.

This language and these guides cause the Court . . . (App. 152-153)

Furthermore the court made clear its view of the scope of the Act during trial by its questioning of counsel:

The Court: [addressed to counsel for plaintiff] May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pick-up and delivery and your operational theory is correct, why do you need any of this evidence of control? (App. 41)

The Court: Well they [the defendant] would be justified in the sense of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions. (App. 41)

* * * * *

The Court: Didn't they hold—

Mr. Corrigan: What's that, sir?

The Court: —In effect, in substance and effect, the traditional agency standard should apply.

Mr. Corrigan: In the—

The Court: And for the purposes of determining whether he is an employee? (App. 147)

The Court: Now, aren't you entitled to look to the law of "agency" to determine whether he was an employee of the railroad? (App. 147)

It is thus abundantly clear that the district court knew and understood the competing legal theories, and accepted the *Smith* formulation as a correct interpretation of the Act (though recognizing that the question "presents serious difficulty").

Moreover, petitioner continually urged the "agency" theory on the district court. See Appendix 22, 26, 146. Having been successful in persuading the district court to adopt an erroneous construction of the Act, he now seeks to rely on the one element which the court undoubtedly rejected—the finding of an employment relationship between Kelley and SP.

Finally, we urge that petitioner did not brief to the Court of Appeals any question with regard to interpretation or construction of the district court's findings. He simply asserted there was a finding of an SP employment relationship, when a literal reading did not disclose it. The findings have an obvious failure to find a jurisdictional fact—an employment relationship with a common carrier railroad. If petitioner wished to overcome the obvious failure, he should have advanced his reasons and authorities to the court below. He did not do so. The result is, any question of interpretation of the findings:

i) was not briefed or urged to the Court of Appeals,

ii) is not briefed here,

iii) does not present conflict in the circuits, and

iv) does not present questions of importance worthy of this Court's review.

VII Petitioner's Case Authority Does Not Stand for an Enlarged Plaintiff Class.

Petitioner relies on cases from the Third Circuit (*Bryne* [sic] *v. Pennsylvania R.*, 262 F.2d 906 (3rd Cir. 1959)), Fourth Circuit (*Smith v. Norfolk & Western R.*, 407 F.2d 501 (4th Cir. 1969)), Sixth Circuit (*Cimorelli v. New York Cent. R.*, 148 F.2d 575 (6th Cir. 1945)), *Pennsylvania R. v. Roth*, 163 F.2d 161 (6th Cir. 1947)), *Pennsylvania R. v. Baralian* [sic], 172 F.2d 710 (6th Cir. 1949)), Seventh Circuit (*Schroeder v. Pennsylvania R.*, 397 F.2d 452 (7th Cir. 1968)) and Tenth Circuit (*Missouri-K-T R. v. Hearson*, 422 F.2d 1037 (10th Cir. 1970)).

We agree with petitioner (brief p. 30) that, with the exception of the *Smith* case, all the foregoing cases have a conventional understanding of the scope of the plaintiff class—i.e., employment. Furthermore, despite the varying factual circumstances, all find the respective plaintiff or decedent to be an employee. None, except *Smith*, state or hold that agents or their employees are within the plaintiff class. Therefore none of these cases, except *Smith*, has any bearing on the question before the Court. The specific language holding the plaintiff to be an employee was previously quoted from the *Cimorelli*, *Barlion* and *Roth* decisions. In *Schroeder* the court says, "In view of both the testimony concerning control . . . we believe there was a genuine factual issue as to whether Schroeder was an 'employee' . . ." (p. 456). In *Hearson* the court, noting that the district court relied on *Smith v. Norfolk & Western R.*, but not discussing or relying on it itself, held "Hearson was an employee . . ." (p. 1042).

Reliance on this authority is therefore misplaced.

VIII. No Other Factors Present in This Case Are Sufficient to Establish an Employment Relationship.

Petitioner makes a variety of miscellaneous arguments which can best be dealt with one after another.

A. TARIFF RESPONSIBILITY DOES NOT ESTABLISH EMPLOYMENT.

Petitioner appears to argue at several points that inclusion of a service in a tariff is sufficient to make the work "railroad work."

However, the fact is, every railroad is required by law to file tariffs covering a great variety of services which it does not perform. Section 6 of Part I of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C. § 1 *requires* the filing of schedules of rates for all charges for "transportation" as defined in § 1(3) (a) of the Interstate Commerce Act. The definition of transportation is a wide one and includes "all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery . . . and handling of property transported." As so defined, the term is broader than the pure transportation service of which railroad common carriage consists. It includes services such as icing of cars, weighing, storage, and loading and unloading. The mere publication of a tariff does not make every service covered in it part of railroad common carriage, *Republic Carloading and Distributing v. Missouri Pacific R.*, 302 F.2d 381 at 387 (8th Cir. 1962), or require that persons performing the services be employees of the railroad common carrier. See *United States v. Interstate Commerce Comm.*, 352 U.S. 158 (1956).

B. NON-DELEGABLE DUTY AND OPERATIONAL ACTIVITY CONCEPTS DO NOT CREATE EMPLOYMENT.

Petitioner states, "The work being performed by petitioner was of such a nature that respondent, Southern Pacific Company, could not delegate that work as a matter of law." (brief p. 26) This thesis was also accepted by the

district court. (Finding IX, App. 30) A related contention is that performing an "operational activity" automatically makes one an employee. (footnote 10, p. 24 of petitioner's brief)

The concept of non-delegable duty has long roots in tort theory (see Restatement of Agency 2d, Ch. 14, Title C, § 491 et seq.). The concept of operational activity comes from *Sinkler v. Missouri P. R.*, 356 U.S. 326 (1958). The one covers essentially the place where work is to be performed, the other certain kinds of activity affecting employees. But in order to have the benefit of these concepts one must already be an employee. They offer protection for a group that does not have automatic coverage (i.e. workmen's compensation) for work connected injury. They do not extend a measure enacted for rail employees to groups which have another employment affiliation. These concepts do not create employment where none truly exists.

While we find no case in this Court considering the precise question of whether there is such a thing as non-delegable work, the Ninth Circuit has considered it twice:

In *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350 (1950), the plaintiff Norman was an employee of a private construction company which had been hired by the railroad to repair a bridge. Norman was injured and sued the railroad under the F.E.L.A. claiming "the railroad is under a non-delegable duty to perform such work by its own employees and is therefore liable to any workman injured thereon." (p. 351) The district court in a well-reasoned opinion rejected this contention, stating:

> "The court is of opinion a railroad company may employ a contractor to repair bridges. The duty of the railroad company to keep such transportation facilities in reasonable repair is not nondelegable so far

as employees of the independent contractor are concerned." (p. 351)

The Ninth Circuit affirmed in a *per curiam* opinion "for the reasons given in the district court's opinion." 192 F.2d 1020 (1951)

The same issues reappeared two years later in *Dougall v. Spokane, Portland & Seattle Ry.*, 207 F.2d 843 (1953, 9th Cir.). Plaintiff Dougall was an employee of Morrison-Knudsen who had been hired to perform work on the right of way. In the performance of the work Morrison-Knudsen used a motor truck and flatcar which violated several safety acts. Plaintiff contended that the work of repair, rehabilitation and improvement of the roadway of a railroad is in its nature such as to be non-delegable insofar as the rights and remedies under F.E.L.A. of an employee doing the work are involved. Plaintiff argued:

> ". . . the test is whether the duty to keep in repair its tracks and roadbed is one that the railroad can assign to anyone and absolve itself from any liability flowing from the failure to furnish a safe place in which to work to those making the repairs." (p. 846)

The Ninth Circuit rejected plaintiff's reasoning, however, citing *Norman* and holding that:

> "The liability under F.E.L.A. exists only when there is employment. The expressed condition is that the injury to or death of 'the employee' occurs 'while he is employed by such carrier'." (p. 845)

In addition to these two cases, we believe this Court's construction of the 1939 amendments to the F.E.L.A., while not direct authority, does shed light on the question. Exactly the same sort of contention, i.e., that the Act was intended to apply to certain kinds of typical railroad operations, was made in *Reed v. Pennsylvania R.*, 351 U.S. 502 (1956). Martha Reed was employed by the Pennsylvania at its general office in Philadelphia. Her duties consisted of filing tracings of drawing and having blueprints made which were sent to all parts of the system. She was injured when a cracked window pane blew in upon her. She was a clerical employee who faced, not the hazards of switching box cars, but those of "file cabinets and other office furniture." The defendant railroad lamented that to construe the Act to include Ms. Reed would amount to inclusion of virtually all roalroad employees. The Court answered, "The benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands." Martha Reed had argued in her brief, "A test based on physical proximity is untenable." This Court agreed, holding that exposure to the special hazards of the railroad industry is no part of the test of the Act ("There is no meaningful distinction, in terms of whether the employee's duties are clerical or not . . ."). The case rejects an activity test, whether related to tariff responsibilities, agency status, clerical work or what have you, and embraces an employment test. The same logic should be applied here.

Finally, even if one thought there were certain kinds of intrinsically railroad work (e.g. locomotive engineer), still that would not extend to the facts of this case. Even the *Smith* court conceded, ". . . historically and traditionally the railroad is responsible neither for loading nor for unloading . . ." 407 F.2d at 503. It is a commonplace that railroads do not unload, especially when dealing with carload lots, as here. *Republic Carloading and Distributing v. Missouri P. R.*, 302 F.2d 381 (8th Cir. 1962), *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954). Surely such work cannot be part of the "franchise," as petitioner argues.

C. FREE TRANSPORTATION DOES NOT ESTABLISH EMPLOYMENT.

Petitioner contends that SP treated the unloading personnel as "employees" because at various times in the past they had been granted either free or reduced-rate rail transportation. This argument fails to note:

i) the statute, 34 Stat. 584, 49 U.S.C. § 1(7) does *not* say only railroad employees may be issued free passes. A broad range of people may be given free transportation, including "the employees of common carriers, and their families . . ." PMT is a common carrier (App. 13). *United States v. Erie R.*, 236 U.S. 259 (1915) appears to sanction the very exchange of passes with other "common carriers" which took place here.

ii) The transportation may also have been lawful under state laws, e.g., California Public Utilities Code § 521 et seq. See especially §§ 527-528, which seems to expressly contemplate that which was done here.

iii) Even if unlawful, it would be just that—a criminal violation, not a finding of employment.

D. IT IS NOT NECESSARY TO ENLARGE THE PLAINTIFF CLASS IN ORDER TO REGULATE THE CONTRACTING OUT OF WORK.

Petitioner argues that this case must be reversed, else, respondent will have "the power, as well as the authority to delegate portions of their franchise at their whim and at their unbridled discretion." (brief p. 27)

It is an old notion and deserves to be put to rest. One should not attempt to regulate the contracting out of work by abortive construction of a work-injury law. Such an effort would be like deciding the question of whether Longshoremen or Teamsters should be allowed to stuff cargo containers by a fanciful construction of the Longshoremen and Harbor Worker's Compensation Act. This is the long

way around of saying that other laws and institutions exist to control the contracting out of types of work (see *Order of Railroad Telegraphers v. Chicago & N.W. R.*, 362 U.S. 330 (1960)), and one need not rely on construction of a work injury statute to accomplish that purpose. It is foolish to suppose that the United Transportation Union, for example, would allow the SP to contract out the jobs of locomotive engineers, just as it is naive to suppose that the International Brotherhood of Teamsters would sit idly by while somebody tried to award to rail craft unions the jobs of unloading piggyback and multilevel cars.

E. UNSUPPORTED FACTUAL CONTENTIONS ON DIRECTION AND CONTROL CANNOT SUBSTITUTE FOR A FINDING OF EMPLOYMENT.

Petitioner asserts that, "Southern Pacific Company supervisors directly and indirectly participated in managing and directing the automobile unloading process." (brief p. 8) A similar assertion appears on p. 15, "Pacific Motor Trucking Company, from its highest level down to its lowest, took directions and instructions from Southern Pacific Company . . . with regard to operation of tri-level railroad cars." We wish to point out that these statements are completely unsupported by references to the Appendix. They are also beyond anything contained in the district court's findings.

Petitioner argues that an SP damage prevention supervisor gave him directions (brief p. 8), and that an instruction booklet exerted control over him (brief p. 10). However, the uncontradicted evidence was that the booklet was published *two years after* the accident—Reporter's Transcript from district court, p. 198; Clerk's Record from district court, p. 67. The same is true of the damage prevention supervisor, Jarvis. His occasional duties in the area commenced only in 1964—*after the accident*. (App.

115, 116; Reporter's Transcript, p. 400 typed, p. 452 stamped) Furthermore, even if the described activities had taken place at the time of the accident, the purport of the evidence is not direction and control but "discussion," "advice" and cooperation, e.g., "It's a mutual thing." (see testimony of Jarvis, App. 118) At most this is an example of "minimum cooperation necessary to carry out a coordinated undertaking." *Shenker v. Baltimore & Ohio R.*, 374 U.S. 1 at 6 (1962); *Standard Oil v. Anderson*, 212 U.S. 215 (1909).

F. THE CONCEPT OF UNSEAWORTHINESS SHOULD NOT BY ANALOGY EXPAND THE STATUTORY SCOPE OF THE F.E.L.A. PLAINTIFF CLASS.

It is not clear whether petitioner is arguing that construction of the F.E.L.A. plaintiff class will restrict the scope of the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, or that the F.E.L.A. plaintiff class should be enlarged by analogy to the remedy of unseaworthiness.

Either argument should be rejected. Since we are arguing that the F.E.L.A. class should not be changed, it is not clear how this would restrict the Jones Act other than ways in which it presently does. On the other hand, there is no land-based law comparable to unseaworthiness, and no policy consideration comparable to admiralty's special solicitude for the welfare of those who venture upon hazardous sea voyages, which underlies unseaworthiness. The statutorily created F.E.L.A. plaintiff class should not, therefore, be enlarged through this analogy.

IX. Policy Considerations Urge the F.E.L.A. Plaintiff Class Not Be Expanded.

This case raises perfectly the question of whether the F.E.L.A. plaintiff class should be enlarged. It does so because:

i) alter-ego issues—"conduit," "instrumentality," "adjunct," etc.—were abandoned by petitioner,

ii) the district court was unable to find an employment relationship with the defendant railroad,

iii) there are no special or unique facts which distinguish petitioner's situation from that of any other teamster performing piggyback or multilevel services, and

iv) there are no other questions on which review is sought or which are worthy of review by this Court.

If the plain wording, statutory history and settled judicial construction are insufficient to answer that question, we urge the following considerations.

On any suggested reformulation of the plaintiff class (e.g., to include those performing accessorial services, nondelegable duties, agents, etc.) large, new groups of persons will be drawn into the F.E.L.A. It is impossible, however, to justify expanding the F.E.L.A. to new groups as a remedy for work-connected injury. Justices of this Court have said it often enough:

> "This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally . . . It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be."

Wilkerson v. McCarthy, 336 U.S. 53 (1948), concurring opinion, pp. 65-66. More recently it has been characterized as "drawn-out, costly and uncertain process that was dismissed long-ago . . ."[9]

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9. The Report of the National Commission on State Workmen's Compensation Laws, p. 45, transmitted to the President and Congress July 31, 1972; Government Printing Office, July 1972. See also pp. 25 and 52.

It used to be argued workmen's compensation was inadequate. With the advent of the Report of the National Commission on State Workmen's Compensation Laws,[10] the passage of amendments to the Longshoremen's Act,[11] the pendency of bills formulating federal workmen's compensation standards,[12] and the pressure for legislative change being exerted by organized labor, that argument will soon evaporate.

In the meantime, the evils of the F.E.L.A. remain. The only unbiased study is that of the Railroad Retirement Board, Railroad Industry Work Injuries, 1938-1940 (2 volumes). The Board found the Act fails to meet every criterion of a well-designed, equitable work injury compensation system. The F.E.L.A. has no system for periodic, regular payments during the period of injury, featuring instead settlements or judgments years after the accident. It has no certainty of recovery, many cases being lost or settled for small amounts because of compromising fact situations. It has all the aspects of a lottery, with wide variation in the level of payments for similar injuries, not only from one part of the country to another but within individual rail companies. It pits employee against employer at the very moment when he most needs help—i.e., when he is injured. The principal author of the Board's study, Jerome Pollock, has written, ". . . any objective appraisal of this Act is bound to sound like a denunciation."[13] The data may be old, but no one has suggested the deficiencies of the system do not remain.

10. Id.

11. § 86 Stat. 1251, 33 U.S.C. § 901, Public Law 92-576, 92d Congress, 2d Session.

12. HR 8771, 93rd Congress, 1st Session.

13. § 36 Cornell Law Quarterly 236 (1951).

On the contrary, these evils are inherent, and are even more entrenched and pronounced as time goes along. They are bound to poison a concurrently functioning system of workmen's compensation. For example, workmen's compensation can provide for rehabilitation in severe injury cases.[14] It is impossible, however, to imagine rehabilitation succeeding where the personal injury lawsuit mechanism and the financial incentives of a jackpot verdict are hovering over the injured person from the moment of his accident.[15]

The accepted norm for the adjustment of work-connected injury is workmen's compensation. In this country we are developing a truly effective and innovative compensation system. What is needed is to extend this accepted norm to the two industries in which it is lacking (rail and maritime), and to abolish the F.E.L.A. We ought not to extend the F.E.L.A. to new groups which do not now have it.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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14. Report of the National Commission on State Workmen's Compensation Laws, supra., Ch. 4.

15. Id. p. 25.

(Note in regard to appendix follows)

Note in Regard to Appendix

References in the text of this brief to pages of the Appendix are abbreviated "App. ....."

The Appendix contains the following errors and omissions of designated and agreed items, which may be material to respondent's case:

1) The Judgment of the Court of Appeals appears not to be printed.

2) On page 9, "Findings and Award from the Workmen's Compensation Appeals Board," was actually attached as an exhibit to the affidavit of R. K. Booth, which starts on p. 12.

3) On page 56 after the third line, two lines of testimony are omitted. They read:

> The Court: Was this before or after 1963?
> The Witness: I think it was before (Reporter's Transcript from district court, p. 115)

4) On page 143 about the middle of the page, immediately after the answer:

> The Witness: I took my orders directy from the terminal manager, Mr. George Hellwig.

Five lines of testimony are omitted. They read:

> The Court: Did you take any orders from the Southern Pacific personnel?
> The Witness: No, sir.
> The Court: At any time between '58 and '63?
> The Witness: No, sir.
> (Reporter's Transcript, pages 484 and 485 typed, 537 and 538 stamped)

5) On page 86 between the matter from pages [217] and [232], the entire designated testimony of witness Manuel Teijeiro is omitted. It reads as follows:

"MR. ENGEL: Q. Now, on the day of the accident, how did you first become aware of the accident?

A. Well, saw—well, I was at the. . . . We saw an ambulance coming down to the yard. My supervisor and partner were together, checking some material."
(Reporter's Transcript, stamped page 236)

"Q. Now, did you have—when you got to the scene where Mr. Kelley was, was Mr. Kelley still there?

A. No, they were taking him through the cars on a stretcher to the ambulance.

Q. All right, did you see him being taken away on a stretcher?

A. Yes."
(Reporter's Transcript, stamped page 250)

Commencing with the testimony of Witness Manuel Teijeiro, which starts at page 230 of Volume I of the Reporter's Transcript and continues to the end of that volume, a *double numbering system* appears in the transcript, viz. typed numbers and stamped numbers. This is apparently because the testimony of Teijeiro was separately transcribed and then inserted later when the remainder of the testimony was transcribed.

The page references in the Appendix (printed in brackets) are to the typed page numbers of the transcript. However, commencing on page 150 of the Appendix the references are to the stamped numbers. Also the material on page 153 is in part a duplication of the material appearing at the bottom of page 149 commencing with [545].

We find the Appendix confusing to read because it does not identify the witness (and in some cases documents). In the hope that it will aid in understanding, and does not violate the rule, we offer the following INDEX TO THE APPENDIX.

INDEX TO THE APPENDIX

	Page
Material from Clerk's Record, district court, commences	1
Portion of interrogatories and answers	1
Interrogatory	5
Answer	7
Workmen's Compensation Appeals Board—Findings and Award (should appear after p. 18)	9
Motion for Summary Judgment (initial portion only) commences at [179]	11
Affidavit of R. K. Booth in support of motion, commences at [224]	12
Workmen's Compensation Appeals Board—Application for Benefits	19
Plaintiff's Memorandum in Opposition to Motion for Summary Judgment (portion only) (title of case for this paper appears on p. 21)	22
Pre-Trial Order (portion only—title omitted in printing) commences at [265]	23
Order Denying Motion for Summary Judgment	24
Plaintiff's Trial Memorandum (portion only)	25
Plaintiff's Closing Brief (portion only)	27
Findings of Fact and Conclusions of Law	28
Judgment	31
Opinion in Ninth Circuit	32
Notice from Clerk of Entry of Judgment of Court of Appeals	38
Order Denying Petition for Rehearing	39

Page

Material from Reporter's Transcript, district court, commences 41

Opening statements (portions only) 41

Testimony of John Grimmado (a co-worker of plaintiff) commences at [32] 42

Testimony of Cornelius Oosterbaan (a co-worker of plaintiff) commences at [131] 59

Testimony of Robert Graham (an SP car inspector) commences at [232] 86

Testimony of Clayton Calkins (PMT manager of personnel) commences at [263] 87

Testimony of Elwood Jarvis (SP damage prevention supervisor) commences at [364] 114

Reading of Interrogatories and Answers commences at [406] 121

Testimony of Eugene C. Kelley commences at [424] 129

Testimony of John Holland (SP car clerk) commences at [476] 139

Testimony of Leslie LaBerge (PMT supervisor) commences at [483] 142

Closing Argument commences at [513] 146

Announcement of Ruling commences at [545] and [598] .....149 and 152

Motion for Correction of Record in Court of Appeals, and Order 156

Affidavit in support thereof 158

Proposed Findings of Fact in district court, attached to motion 161